BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates, Washington Citizen Action, Welfare Rights Organizing Coalition, American Lung Association of Washington, Northwest Federation of Community Organizations, Northwest Health Law Advocates, Service Employees International Union Washington State Council, The Children's Alliance, Washington Academy of Family Physicians, Washington Association of Churches, Washington Protection and Advocacy System and Washington State NOW, Applicants for Intervention.	No. G02-45 PREMERA WATCH COALITION'S SUPPLEMENT TO JOINT REPLY ON MOTION TO INTERVENE

I. INTRODUCTION

The above captioned Applicant-Intervenors, all members of the Premera Watch Coalition[1] (hereinafter the "Coalition"), support the OIC staff recommendation that the

[1] The Coalition has organized itself around a common set of principles. Declaration of Eleanor Hamburger, Exhibit 1.

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Applicant-Intervenors combine into groups, in order to promote efficiency, at least during the discovery phase of the adjudicative proceeding. The Coalition is pleased to combine with the Washington Association of Community and Migrant Health Centers to form a "Washington consumer and provider group" as described in the Joint Reply on Motions to Intervene. The Coalition applicants also agree that a pre-hearing conference should be convened to discuss discovery issues. This brief will focus on the Coalition's specific "significant interests" and will address Premera's arguments against intervention of the Coalition applicants.

The Coalition has demonstrated that its interests are significant and relevant, and that its expertise will provide the Insurance Commissioner with information that he may not otherwise receive from the OIC Staff or its experts.

Premera, on the other hand, argues that the Coalition does not have a significant interest, despite its broad constituencies that will all be impacted by the proposed conversion, its expertise on this issue, and its commitment to providing additional, useful information to the Insurance Commissioner to assist with his deliberations. Premera's position begs the question, who, if anyone, would have a "significant interest" to intervene under the Washington Holding Company Acts, if not the Coalition?

II. ARGUMENT

Premera's opposition to intervention is based on a series of unpersuasive and internally-contradictory arguments. For example, Premera argues first that the Coalition's interests are the same as the general public and are represented by the Insurance Commissioner and Attorney General. Premera Opposition at 3. In the next paragraph, Premera argues that intervention by the Coalition would be unfair to "unrepresented persons" within the state. Id. Then Premera argues that providers (some of which are included in the Coalition) have an interest that is too

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"special" to be "significant." Premera Opposition at 28. Premera further argues that the Coalition's significant interests regarding access to health coverage for low-income persons are beyond the scope of the review by the OIC and Attorney General. Premera Opposition at 35-36. However, Premera also argues that the Coalition's concerns about the health impact are covered by the OIC Staff and experts. Premera Opposition at 16-17. Even apart from the patent inconsistency of these arguments, none of them individually supports denying the Coalition's Motion for Intervention.

1. Applicant-Intervenors need not demonstrate that their interest is completely different from that of the Insurance Commissioner, his staff or the general public.

In the Holding Company Acts, the Legislature simply indicated that individuals with a significant interest may have the ability to participate in the adjudicative hearing. It did not place any further restrictions or limitations on the exercise of the Insurance Commissioner's discretion to authorize the Applicant-Intervenors' participation. Nothing requires that the Applicant-Intervenors make any showing that the OIC staff and experts are somehow not representing any of their interests. Nothing in the plain language of the Acts requires that the Applicant-Intervenors demonstrate any interest that is greater or completely different from that of the Insurance Commissioner nor his staff; the Acts contemplate participation by everyone with a significant interest. RCW 48.31C.030(4); 48.31B.015(b). See also Fritz v. Gorton 8 Wn. App. 658, 661-662 (1973) (even though a regulator may be generally charged to address the interest of an organization, there still may be a divergence of interest between a regulator and an applicant for intervention that necessitates intervention).

However, even if some additional interest beyond that represented by the OIC Staff were required, the Applicant-Intervenors have identified that their involvement, particularly regarding

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the impact of the proposed transaction on Washington's health system, will supplement and enhance the OIC staff and experts' review.[2] Thus the Applicant-Intervenors at most have overlapping but not co-extensive interests with the OIC.

Premera argues that an interest that is the same as any member of the public is not "significant," relying on a case in which the state's Utilities and Transportation Commission rejected a motion for intervention by *competitors* to the regulated company. Premera Opposition at 14-15, citing to In Re US WEST Communications, Inc., No. UT-951425, 1997 Wash. UTC Lexis 26 (1997). Premera is incorrect, since the opinion in US WEST rejects the competitors' intervention because its involvement was for the purpose of protecting and promoting the competitor's own interests, not the public's interests. Id. at 19. Importantly, the Administrative Law Judge in the case *permitted* the intervention of a consumer organization in order to represent the substantial interest of consumers in the transaction.[3] Id. at 6.

Premera also argues that the Coalition is no different from the general public when it asserts that its members represent beneficiaries or potential beneficiaries of the nonprofit assets

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[2] See Declarations of Barbara Flye of Washington Citizen Action, Jean Colman of the Welfare Rights Organizing Coalition, LeeAnn Hall of the Northwest Federation of Community Organizations, Janet Varon of Northwest Health Law Advocates, Ellie Menzies of the Service Employees International Union Washington State Council, Elizabeth Arjun of The Children's Alliance, Vicki Black of the Washington Academy of Family Physicians, Julie Watts of the Washington Association of Churches, Mark Stroh of Washington Protection and Advocacy System, and Linda Tosti-Lane of the Washington State Chapter of the National Organization for Women [hereinafter known collectively as Declarations of Coalition Groups] attached to the Coalition's Memorandum in Support of Motion to Intervene.

[3] In this case, since the proposed Premera conversion will likely impact nearly every health care consumer in the state, Applicant-Intervenors should not have their involvement thwarted because of the great public interest at stake in the conversion proposal. In fact, the huge public interest in the transaction strongly supports intervention in by public interest groups.

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held by Premera.[4] Premera Opposition at 20-22. However, because the Coalition is composed of organizations that work on health-related issues and whose constituencies will likely benefit from a fully funded, independent charitable health foundation established as a result of any conversion, they have a significant, vested interest, greater than an unconcerned member of the general public, in the disposition of the assets.[5]

Moreover, while the Attorney General is authorized to protect the interests of the public in a conversion, RCW 24.03.230, emerging caselaw demonstrates that beneficiaries may also have a "special interest" in order to protect a charitable trust. See generally Mary Grace Blasko et al., Standing to Sue in the Charitable Sector, 28 U.S.F.L. Rev. 37 (1993); Alison Manolovici Cody, Success In New Jersey: Using The Charitable Trust Doctrine To Preserve Women's Reproductive Services When Hospitals Become Catholic, 57 N.Y.U. Ann. Surv. Am. L. 323

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[4] Premera disputes that it holds any assets subject to the *cy pres* doctrine and claims that none of its predecessors were charitable in nature but provides neither citation nor attachment to dispute the language of the original charter documents of its predecessor corporations. Premera Opposition at 20. Premera also argues that the Washington State Hospital Association's claim that it may also have an interest in the nonprofit assets held by Premera is unfounded and that there is information "in the record" that demonstrates that WSHA's claim has no merit, yet it fails say what part of "the record" it means. Premera Opposition at 30. Premera should be required to submit documentation of all factual claims into the formal administrative record, or refrain from argument about which there are no facts in evidence.

[5] Valuation is an integral part of the Washington Consumer Groups' significant interest in the disposition of the nonprofit assets held by Premera. If Premera is not required to divest itself of the full value of its nonprofit assets upon conversion, the for-profit company and possibly key individuals within the company may profit improperly from the transaction, and the charitable foundations will be underfunded. Past conversions where the full value of the corporation was not properly assessed resulted in phenomenal windfalls to insiders. See Ann Lowery Bailey, Charities Win, Lose in Health Shuffle, The Chronicle of Philanthropy, June 14, 1994 at 1 attached as Exhibit 5, Declaration of Eleanor Hamburger. The Washington Consumer Groups disagree with Premera's self-serving characterization that the stock it proposes to transfer to the shareholding foundation adequately accounts for the full value of the nonprofit assets.

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(2000)(describing litigation in which the New Jersey ACLU was granted standing to intervene in the judicial review procedure governing the merger of two nonprofit hospitals, in order to protect the secular health care mission of one of the hospitals); Paterson v. Paterson General Hospital, 97 N.J. Super. 514, 527 235 A.2d 487, 495 (1967); San Diego etc. Boy Scouts of America v. City of Escondido 92 Cal. Rptr. 186, 14 Cal. App.3d 189 (1971); See also Milt Freudenheim, *Judge Freezes the Money Raised from Health Insurer's Stock Sale*, New York Times, November 9, 2002, at C14 (describing temporary restraining order obtained by consumer groups who alleged standing to sue to protect the charitable nonprofit assets held by Empire Blue Cross as it converted to for-profit status).

2. Providers' potential financial impact as a result of the conversion supports their "significant interest" for intervention.

Premera argues that the particular interest of providers in ensuring that their reimbursement rates are not adversely impacted by conversion has no place in the adjudicative hearing under the Holding Company Act. Premera Opposition at 28-29; 31-36. Apparently, while Premera argues that consumer and policyholder interests are not "special" enough, it finds that the specific pecuniary interest of providers is too "special."

Premera is simply wrong when it argues that provider reimbursement rates are directly "tied" to rates paid by consumers. Premera Opposition at 32. Premera ignores that when it becomes a for-profit stock company, the profits it must ensure for its shareholders will become part of that equation. Thus, consumers could be forced to pay higher rates, while provider

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reimbursement rates are ratcheted down, all to give greater profits to shareholders, or future purchasers of the company, who may care little about the health impact in Washington state.[6]

3. The Insurance Commissioner's authority extends to considerations of the health impact of the transaction.

Premera argues that considerations of the health impact of the proposed conversion are not covered by the Holding Company Acts standards for review. Premera Opposition at 35-36. Yet Premera forgets that it recognized earlier in its Opposition that the OIC Staff and experts are required to consider whether the transaction will "substantially increase or will prevent significant deterioration in the availability of health care coverage." Premera Opposition at 16; RCW 48.31C.030(5)(a)(ii)(B)(II). The Insurance Commissioner is clearly required to consider the health impact of the conversion on Premera enrollees, the insurance-buying public and the

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[6] Premera claims that it has no plans to sell the company after it converts. Premera Opposition at 22. Yet, nearly every "stand-alone" Blue Cross and Blue Shield conversion that has occurred eventually resulted in the company's takeover by a large, for-profit, out-of state chain, such as Anthem or Wellpoint. See Conversion and Preservation of Charitable Assets of Blue Cross and Blue Shield Plans: How States Have Protected or Failed to Protect the Public Interest, Consumers Union, November 2002 at http://www.consumersunion.org/health/bcbs1102.htm, describing the conversion and eventual takeover of the Blue Cross/Blue Shield plans in Missouri, Georgia, Virginia, Colorado, as well as the purchase of plans in Kentucky, Maine, New Mexico and New Hampshire.

Premera has tried to mollify its critics in the past with similar empty assurances. In February, 2000, Premera wrote Senator Pat Thibideau, in an open letter to the Washington Legislature, "Premera Blue Cross has served the people of this state as a non-profit from its inception in 1945. We have no plans to convert to for-profit status, and the issue of conversion is not even under consideration by the company." The letter was signed by then Chief Executive Officer and Vice Chair of the Board of Directors, Betty Woods, and then President Chief Operating Officer and CEO elect, H.R. Brereton "Gubby" Barlow. Declaration of Eleanor Hamburger, Exhibit 6.

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public interest.[7] RCW 48.31C.030(5)(a)(ii)(B)(II);(C)(II); (IV). The broad standards of review under the Holding Company Acts include the health impact of the conversion on nearly every member of the public. Some of the Applicant-Intervenors have requested that the OIC Staff and experts consider the health impact as part of their review. Letter from Claudia Saunders to James Odiorne and Robert Fallis, dated August 21, 2002, attached as Exhibit 7, Declaration of Eleanor Hamburger. However, neither the Attorney General's Office nor the OIC Staff indicated that their experts would undertake such a review.[8] Letter from James Odiorne to Claudia Saunders dated September 6, 2002; Letter from Robert Fallis to Claudia Saunders dated September 10, 2002, attached as Exhibits 8 and 9 to Declaration of Eleanor Hamburger.

The Coalition decided to raise sufficient funds to commission an evaluation to provide the Insurance Commissioner and the public with a comprehensive look at the health impact of the proposed conversion. See Declaration of Eleanor Hamburger at 2. The Coalition intends that this study complement the work done by the OIC Staff and experts, and plans to work with all parties to ensure that the information is useful, helpful and not duplicative. However, the

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[7] Premera also argues that the Coalition's concerns about state-sponsored coverage have no bearing on the company's status as a nonprofit or a for-profit, claiming that the only value it uses in determining whether to continue in state-sponsored coverage is whether the program is "financially viable." Premera Opposition at 17. Based upon this statement, the Coalition questions whether Premera, while technically a nonprofit, remains in compliance with its nonprofit mission and other requirements.

[8] Nor do the experts hired by the OIC Staff have the specific expertise and knowledge of the Washington health system held by the Health Policy and Analysis Program (HPAP) at the University of Washington. In fact, the HPAP program is so highly regarded by the State of Washington that it regularly employs HPAP to conduct extensive studies of our health system. See Health Policy Analysis Program website for a list of recent studies and publications commissioned by Washington state governmental offices, available at http://depts.washington.edu/hpap/.

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Coalition needs to intervene, in part, to gain access to needed documents and data to conduct an effective health impact study. See Declarations of Coalition groups, attached to Memorandum in Support of Motion to Intervene.

4. WPAS' authority and mandate under the Protection and Advocacy Acts, its institutional priorities, its expertise and the interests of its constituents provide it standing to intervene and the significant interest necessary for intervention.

Premera implies that WPAS' federal statutory mandate under the Protection and Advocacy Acts[9] do not provide it any different standing or authority to represent the interests of its constituents in legal or administrative actions (including this proceeding) than "any other organization" possesses. Premera Response at 39-40. This is simply not correct. Unlike most non-profit advocacy groups, Congress has expressly required that state-designated protection and advocacy agencies (P&A's) such as WPAS shall have the authority to protect and advocate for the rights of their constituents both in a wide variety of fora, including administrative proceedings, and through the exercise of its federal mandate. See, e.g. 42 U.S.C. §§ 10805(a)(1)(B), (C), § 15043(a)(i); 29 U.S.C. § 794e(3). Under this authority, WPAS has broad standing to act as an agency on behalf of itself, individual persons with disabilities, and the broader community of persons with disabilities, in advocating for the interests of its consituency.[10] Conversely, the only authority Premera cites in support of its position that

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[9] These include the "Developmental Disabilities Assistance and Bill of Rights Act" (DDA), 42 U.S.C. §15041, et seq., the "Protection and Advocacy for Individuals with Mental Illness Act" (PAIMI), as amended, 42 U.S.C. § 10801, et seq.; and the "Protection and Advocacy for Individual Rights" (PAIR), 29 U.S.C. § 794e. See also RCW 71A.10.080 (requiring establishment of Washington state's P&A with authority consonant to its federal mandate).

[10] As the 11th Circuit stated in a case involving the Florida P&A, aka the "Advocacy Center:" "In a very real sense … the [Advocacy Center] represents the State's individuals with mental

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WPAS is no different than any other advocacy group consists of caselaw turning on considerations inapplicable to administrative proceedings like this one.[11]

However, the Commissioner need not go so far as to find that the Protection and Advocacy Acts in themselves provide an independent legal avenue for WPAS' intervention here. Premera's proposed conversion threatens to have a broad negative impact on the significant interests of WPAS as an organization and of persons with disabilities in Washington State. See supra §II 1; Declaration of Mark Stroh ¶¶ 5-12; Declaration of Janet Varon at 4. WPAS' federal authority provides it both significant interests prejudiced by the proposed conversion and standing to act on its own behalf and on behalf of persons with disabilities whose significant interests are likely to be prejudiced by the proposed conversion. See Rubenstein v. Benedectine Hospital, 790 F.Supp. 396, 408 (N.D.N.Y. 1992); Trautz v. Weisman, 846 F.Supp. 1160, 1163 (S.D.N.Y. 1994).

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illness and provides the means by which they express their collective views and protect their collective interests." Doe v. Stincer, 175 F.3d 879, 886 (11th Cir 1999).

[11] For example, in support of its contention that state protection and advocacy agencies "must satisfy the same standard for intervention as any other third party," Premera cites an unreported case in which a federal district court held that a group of P&A's opposing a class action settlement to which they were not parties were precluded from objecting to it, in large part because they filed their objections over 100 days after the deadline for objecting had passed, they misrepresented to the court that they had not received actual notice of the contents of the proposed settlement or deadline for objections, and in any event, they didn't satisfy Fed. R. Civ. P. 23(e). See Premera Response at 40; Ass'n for Disabled Americans, Inc. v. Amoco Oil Co., 2002 WL 31512705 at *16-20 (S.D. Fla. 2000). Premera also implies that WPAS should be denied intervention in this proceeding because it does not fulfill the Article III requirements for standing to sue in court, citing Tennessee Protection & Advocacy, Inc., 24 F.Supp.2d 808, 816 (M.D. Tenn, 1998); Doe v. Stincer, 175 F.2d 879 (11th Cir. 1999). Premera's arguments are irrelevant. This is not a lawsuit in court, and such considerations do not govern participation in this administrative proceeding under RCW 48.04.010(1)(b), 48.31B.015, 48.31C.030(4), and 48.31C.140.

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IV. CONCLUSION

The Coalition Applicants should be granted full participation in the adjudicative hearing regarding Premera's proposed conversion, in accordance with the proposed Order attached to the Joint Reply on Motions to Intervene.

Dated this 20th day of December, 2002.

Respectfully submitted by:

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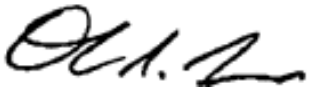

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